Third Edition | Chapter 3

GETTING TO YES

FROM LOI TO CLOSING THE DEAL

BEST PRACTICES OF THE BEST DEALMAKERS

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Introduction by
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"Instead of following a playbook, use all your God-given (or market-given) tools. Each job is a custom job; know the playbook and then put it aside and do this deal as well as this deal can be done."

Marshall Sonenshine
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INTRODUCTION

Drawing on the experience and expertise of the "best in class "dealmakers, The M&A Advisor (http://www.maadvisor.com), together with the leading provider of virtual deal management services, Merrill DataSite® (http://www.datasite.com), publishes the quintessential dealmakers guide series – **"The Best Practices of the Best Dealmakers."** Profiling the proven strategies and unique experiences of the leading M&A practitioners, "The Best Practices of The Best Dealmakers" series is distributed in regular installments for M&A industry professionals in both print and interactive electronic media. Previously published features and chapters are also available in the online library of Merrill DataSite and The M&A Advisor. We are pleased to present **Closing the Deal: from LOI to Close.** This installment examines the Due Diligence process that unlocks the value of the deal; the writing of the Purchase Agreement, which is the most important record of the transaction; and the closing of the deal, which is not necessarily "THE END", as we will see in Chapter 4. On the following pages you'll find helpful observations provided by candid interviews with leading dealmakers, including buyers, sellers and advisors, as well as timely insights into the most current trends.

"Opportunities often occur in the maelstrom, the vortex of multiple parties with their multiple agendas."
~ Marshall Sonenshine

Getting To Yes
From LOI to Closing The Deal

Introduction

Some thirty years ago, as a second-year law student, I took a course called "Negotiation", taught by the late Roger Fisher. His iconic negotiation manual, appropriately entitled *Getting to Yes*, was on the reading list. Fisher, a professor at Harvard Law School, was co-author of the book with William Ury, a professor at Harvard Business School. Of all my law school books, *Getting to Yes* is both the shortest and the one with the longest shelf life. The book would soon take its place in my library with two other brilliant short books that tell essential truths concisely.[2]

Fisher and Ury were faculty rock stars for having written a best seller and for developing negotiation as an academic subject. Ury taught business students presumptively training to become executives, and Fisher taught law students presumptively training to become lawyers. In truth, many HBS alumni become government or other non-business leaders. Many HLS students enter the same world, but many also become business executives. Harvard Business School mints the greatest number of CEOs in the U.S., and surprisingly, Harvard Law School comes in second.

Fisher and Ury were not focused on their students' particular professions as on their general negotiating skills, in the classroom or in their book. In fact, they seemed remarkably indifferent to what, where, or with whom anyone might negotiate. The professors were not concerned with negotiating specifically contracts or treaties or anything else per se. They were interested in negotiation generally. They saw negotiation as its own discipline, with its own dynamics, risks and opportunities. They were right.

I parsed the book carefully in those days, savoring its wisdom. "Know your best alternative to a negotiated agreement," exhorted one section of the book. "You can be tough on the issues without being tough on the people," Fisher would

1. See R. Fisher and W. Ury, *Getting to Yes* (Penguin Group, 1981).
2. The other two great short works in my library are Peter Drucker's *The Effective Executive* and William Strunck and E.B. White's grammar and usage manual, *The Elements of Style*. I suspect few readers today read all, or perhaps even any of these, but I can honestly say that any professional would save himself or herself countless hours of frustration by reading all three. For those of us who lead, write and negotiate for a living, these form a working person's bible.

state in class, with his signature good cheer. That pearl at first struck me as a bit campy for the real world, arguably a variation on the canonical "hate the sin but love the sinner." Still, this one, like Fisher's other simple phrases, would preserve a lifetime of relations and accelerate countless negotiations, at least for this professional negotiator.

I eventually became Fisher's research assistant, working with him on whatever projects he had on his desk at the time. One included sovereign disputes over islands off the coast of Spain; others related to commercial litigation, divorce cases or business negotiations. For Fisher, the fun was in finding solutions that might elucidate the nature of negotiation as its own topic. A generation later, as I approach thirty years of doing deals as an investment banker and a decade as a business school professor, I marvel at how right Fisher was: negotiation is its own discipline, and good deal negotiators know this, as it relates to our profession, just as good litigators or diplomats know this as it relates to their métiers.

Still the question for this volume of Best Practices of the Best Dealmakers is what practices make for success in M&A. What, then, can one say about "Getting to Yes" specifically in the context of doing M&A deals? Reflecting on Fisher's and Ury's wisdom and my own accumulated experience in M&A, I would offer the following eight succinct observations as introduction to the current volume of Best Practices of the Best Deal Makers.

First, if at all possible, avoid being eagerly obsessed with one counterparty. Those with options generally negotiate better than those without options. Too many sellers of companies think they can "find the right buyer" and then focus exclusively on that party. And too many executives on the buy side want to do a search for the right target and then treat that company as if it were the only right answer. Occasionally one does a deal in which the parties are destined to merge and equally see things that way. More often one finds situations where one side is eager to merge and the other can take it or leave it. Best not to be (or at least not to appear to be) in the first posture.

Here one is reminded of the joke about a group of older men who rediscover one of their long-lost friends from college days, a man who as a younger man had always (and arrogantly) insisted on marrying "the perfect woman." Did you ever find her, asked one of the friends? "Yes, I did," said the man. Was she perfect? "Yes – intelligent, attractive, witty and all the rest, but I did not marry

her." Why not? "Well, she was looking for the perfect man." Much of M&A is not about finding the perfect counterparty but about finding a really good counterparty on good terms – or otherwise doing something else. Still, some executives arrogantly believe they will find – and own – perfection.

Second, understand the full myriad of issues that create an economic deal. The most salient but not sole issue is price. Other issues include form of consideration, structure, management incentives, terms and conditions in a stock or asset Purchase Agreement, capital structure, speed, certainty, and other topics. Good deal makers know the interplay among these deal elements, and they structure and pace their negotiation to aggregate an acceptable solution on the full set of issues. Many great deal makers know which issues to put a pin in (get agreement early) and which to put a place holder around (get into a zip code with the other side, but leave some room for closure of that set of "place holder" issues later). Otherwise, one is left with stalemates or backpedaling, which can erode trust, confidence or patience.

I often tell younger bankers at our firm and my students at Columbia that each element of finance, strategy and M&A that one learns is a necessary but not sufficient ingredient to success in deal making. What drives success is not an element but an orientation, an ability to synthesize issues and manage people in a manner calculated to resolve successfully conflicting goals. One can learn how to move each piece in a game of chess, but that will not make you a chess player; for that you need to read the board over a series of inter-related moves by both sides.

Third, understand how the other side bargains. We spent considerable time in my Negotiation class at Harvard assessing different styles of negotiation. At one end of the spectrum were "positional" negotiators, meaning those who take starting positions they intend to negotiate significantly. Some of these bargainers will ask for the moon but might settle for a ham sandwich, and it is useful to discern that early. At the other end were the more "principled" negotiators, who state principles (broad or tailored) that animate their negotiation. Some such principles may be satisfied in different ways, and may be more and less negotiable. Here again one would do well to understand the style of one's opposing party.

Fourth, measure not just the other side's words but also its behavior – and remember that often behavior matters more than words. I am constantly amazed at how many experienced lawyers, bankers, investors and executives

will report on what a counterparty said, as though that were the greatest source of insight into his intent. We learn in life to evaluate conduct more than words. But too many deal makers come back to the office and recite the news – Jones said X – as if that were a bottom line. It may be, but it may not be. Equally or more important are questions like how did Jones say X? And where? And to whom? And when? And what else has Jones said or done over the past days or weeks or longer? And what has Jones been doing? And what are his colleagues saying and doing? Yes, words matter, and one needs to be attuned to them. But they matter as one source of insight, often not the ultimate source.

Fifth, create contexts that can help win desired results. Some deal makers just talk. Others orchestrate – and good orchestration can create good results for the orchestrator. We all do this to some extent, choosing where to seat oneself or others, or in what order to approach certain parties in a multilateral process or even within a particular company, all for tactical reasons. We prepare information memoranda or PowerPoint presentations designed, overtly or subliminally, to create certain impressions. We may obtain a stalking horse before approaching an ultimate suitor. We grant or deny exclusivity periods for particular purposes. Great trial lawyers know that every trial is a show; great deal makers know that every "process" also has its theatrical elements.

In one of my favorite examples of "creating context," the late great U.S. diplomat Richard Holbrooke, in negotiating an end to the war in Bosnia in the 1990's, offered to host a secret negotiation among warring leaders, including the aggressor, Serbian/Yugoslavian president Slobodan Milošević, at an American military base in Dayton, Ohio. (These talks would culminate in the Dayton Accords that ended the regional conflict.) Holbrooke established a brief cease-fire and assured all parties that the secret negotiations would be safely guarded and that if agreement were not reached in Dayton the war could of course continue. The parties would dine at a round dinner table with a white table cloth at the American military base. What Holbrooke did not tell Milosevic in advance was that the makeshift dining room would be set up in a U.S. Air Force hangar with large U.S. fighter jets overhanging the table.[3] The American jets, it seemed, would be contextual.

Sixth, understand that everything – even an auction – is a negotiation. Yes, you read that correctly. Relatively few auctions for companies are true sealed bid auctions like silent auctions at a charity gala. Most are really a series of bilateral negotiations with the seller, and most finalists become negotiation

3. See R. Holbrooke, To End a War (Random House, June 30, 1999).

counterparties in the course of an auction process. Many sell side bankers get mediocre results because they decline to negotiate, instead bowing to their own "process" as though they had no role as negotiators. In any deal category, there is a top quartile and even a top decile group of results on M&A transaction comparables lists; the dealmakers whose deals end up in those best practitioner categories are generally the ones who actually took the trouble to negotiate with the other side.[4]

Seventh, instead of following a canned protocol, do this very particular deal well. Instead of following a playbook, use all your God-given (or market-given) tools. Too many bankers think the process of doing a deal is rote. It is not, any more than is the process of arguing a case or running a company. Running a deal is running a very particular exercise involving a very specific human enterprise (a company) with very specific human beings (the officers, directors, and advisers). Each job is a custom job; know the playbook and then put it aside and do this deal as well as this deal can be done. Here I am reminded of something my wife, a highly regarded psychologist in New York, has often said of her profession: Each patient is unique, each case is unique; the best practitioners have their own schools of thought, their theories, but they are not slaves to doctrine. They focus on each individual patient.[5] I think the same is true of each corporate client, each company, each transaction.

Eighth, Remember Berra. As long as we are on the subject of psychology, one must remember the important words of baseball legend Yogi Berra: "90 percent of this game is half mental."[6]

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4. See, e.g., Sonenshine, "The Case of 1-800 Contacts" (Columbia University Business School, CaseWorks ID #140310A, March 6, 2014). In this example, the high bidder was well above the next highest.
5. See, e.g., Dr. Therese Rosenblatt, "In Memoriam: Martin Bergmann," obituary for Martin Bergmann on behalf of the New York University Psychoanalytic Institute, New York Times, January 30 and February 2, 2014.
6. See Yogi Berra Quotes in Baseball Almanac website, http://www.baseball-almanac.com/quotes/quoberra.shtml (citing Sports Illustrated, May 14, 1979).

Part I: Due Diligence: Unlocking the Value

A: Diligence begins even before the LOI

"Much of M&A is not about finding the perfect counterparty but about finding a really good counterparty on good terms – or otherwise doing something else."
– Marshall Sonenshine

Due Diligence is the arguably the most important process in a deal and is fraught with opportunities and pitfalls. Buyers and sellers, advisors, attorneys, accountants and others (including bankers, insurance brokers and appraisers) spend days, weeks or months poring over financial documents, talking with customers and suppliers, evaluating management and labor agreements, appraising physical and intellectual property, and much more. The findings from the due diligence process impact virtually all aspects of the transaction and lead to the codification of a Purchase Agreement, which becomes the most important document in the consummation of the deal. Intuitively it would seem that the longer the due diligence process, the greater likelihood the transaction will succeed – but recent research has actually found a reverse correlation – and interviews with experts for this chapter bear this out. Virtually all parties involved in M&A work – bankers, lawyers, advisors – agree that the due diligence process has become compressed, particularly during the past five years. Likewise, it should not be surprising that many advisors strongly recommend that due diligence commences even before the LOI.

Ronald Miller, managing director of Cleary Gull, an investment banking business in Milwaukee, WI, is co-head of a group of 16 who do about 15 deals a year involving industrial and consumer companies – "companies that make stuff and make money" – ranging from $10 to $200 million. About half of his deals are with corporate buyers and half with private equity funds. "We are really driving transaction timelines right now. If we can have a buyer close in 30 to 45 days instead of 75 to 90 days, that's a strong competitive advantage in today's marketplace," Miller says. "What that means is the buyers that are playing to win are beginning their due diligence much sooner in the transaction process, sometimes even before the letter of intent is signed." He said focused buyers are even hiring lawyers and accountants in advance of the final bid in order to differentiate their interest in the process. "This has been done in the larger deal market {$100 million-plus} for a longer time but it's moving down into the middle market."

"It's a complete seller's market." ~ James Dougherty

B. Compression correlates to increased competition, not less information

"We have learned that we can't–and we don't–staff our projects with juniors. Everyone on the engagement team is mid-level and up. Our clients cannot afford the time of having junior staffers participate in these compressed engagements."
– Raymond Weisner, Senior Vice President and Managing Director, Valuation Research Corporation

James Dougherty, partner in the Jones Day law firm of Cleveland, OH, who has been involved with more than 100 transactions valued between $50 and $100 billion over the past 15 years, says the pickup in private equity activity in the past 4-5 years is driving the compression of the Due Diligence process significantly. "Private equity sellers were starting to demand better terms – very low indemnity caps, limited protection from reps (representations) and warranties," Dougherty says. The quid pro quo has been private equity sellers recognizing that they need to satisfy the due diligence requests "up front", he says. "Basically, tell buyers, 'Look, we're not going to give you protection on the back end but in exchange we're actually going to give you real diligence on the front end and you'll have to get yourself comfortable with that mechanism.' It's actually gotten to the point now where there's not a ton of diligence and the process is fairly compressed and you're still stuck as a buyer with very limited recourse. It's a complete seller's market." Dougherty also says "serial transactors" are in a much better position by doing multiple deals every year because – whether it's private equity or strategic – they become more efficient and streamlined during due diligence. "From what we've seen, if you're one of those out there who's ready to go and completely organized, you're going to find yourself at a pretty big advantage up front, both from a timing perspective and from being able to absorb the information that's there."

A Dougherty side note: "That obviously puts more pressure on the diligence process generally – the more quickly you're doing things, the more chance for things to slip through the cracks or mistakes be made. So having an organized team where everybody knows the drill is a pretty important element to success in this environment."

Raymond Weisner is a senior vice president and managing director at Valuation Research, responsible for the development and quality execution of client engagements in all major industries. He was also the chief financial officer at two private companies. His team is engaged to help find a transaction's value, a process that has recently shifted. "It used to be that 5-6 weeks was the norm, now the norm is 3-4 weeks," Weisner says. "It's a big change. Five years ago we were quoting 5 weeks or 6 weeks. Now, we ask for 4 and often are allotted less." To compensate, he says, "We have learned that we can't–and we don't–staff our projects with juniors. Everyone on the engagement team is mid-level and up. Our clients cannot afford the time of having junior staffers participate in these compressed engagements. That's our model."

Weisner says his flat organization model results in more efficient work flow and the required of his clients is less because his team has "learned to hone in on the critical issues and grasp them faster and zero in only on the required information and not cast a wider net regarding information requests or questions."

C. A mountain of relevant data – stored in a cloud

"The VDRs make an auction process arguably more efficient because global buyers can be tapped without the need for them to expend significant resource in travel cost." – Steven H. Goldberg, Partner, BakerHostetler, LLP

Central to the trend toward more compressed due diligence timelines is technology. With the exponential, and cost-efficient, proliferation of cloud-computing and network storage over the past decade has evolved today's virtual data rooms. Whereas in decades past, relevant documents and data would be collected, stored and examined in a secure room at a law or accounting firm – a process that could take days or weeks – today's virtual data rooms can be set up in as little as two hours and securely accessed through a web browser from anywhere reached by the Internet.

Steven H. Goldberg is partner and national co-chair of the M&A practice at law firm BakerHostetler with more than 100 lawyers. He has been involved in the M&A business for more than a quarter of a century. He sees the emergence of virtual data rooms as one of the most significant developments in due diligence of his career. Says Goldberg: "The VDRs make an auction process arguably more efficient because global buyers can be tapped without the

"Buyers are doing more. Pre-LOI confirmatory diligence."
~ Dino Mauricio

need for them to expend significant resource in travel cost. VDRs also make preparing for and conducting due diligence easier and more convenient, and relieve the target from confidentiality concerns over office visits by multiple parties."

While the virtual data rooms have produced clear benefits in terms of efficiency and cost, they also bring new risks to the due diligence process, Goldberg pointed out, by encouraging the justification of compressed deal timelines. This often results in the due diligence process being conducted concomitantly with the negotiation and drafting of the transaction documents. "So a buyer is often advancing down the path to signing before they have all of the pertinent data about the seller that they need," he says. "The danger in this is that information discovered during due diligence may require a change in structure to the transaction, and it can be more difficult to effect that change once both parties are invested in an envisaged structure. While the tighter timelines may appear to point toward lower transactions costs, a necessary change in transaction structure often proves costly as well."

Dino Mauricio, chief operating officer and head of M&A at investment bank Brock Capital, has more than 25 years experience in dealmaking, advising in more than 75 transactions with more than $25 billion in combined market value. Because of compressed due diligence time frames – 2-3 weeks now compared to 2-3 months in the past – Mauricio says, "data rooms have to be much more buyer-friendly, and that's why you have more virtual data rooms, much more emailing and intensive sharing of information. That wasn't possible in the past – the technology has certainly helped accelerate the pace at which information is shared between the seller and the buyer." At the same time, he says, there are real inconveniences and dangers for all parties: "Buyers still have the same requirements in terms of what they want to understand about the assets they are acquiring and how to effectively incorporate the risks and liabilities into the Purchase Agreement." Therefore, Mauricio says, buyers are doing more "pre-LOI confirmatory diligence" in order to focus on key issues and value-creation after the LOI – thus the strategic element of the acquisition must be confirmed in the target early in the process. This means more external

advisors – lawyers, bankers, industry experts – have to become involved "to help that strategic buyer assess all the issues he needs to."

Private equity groups are better equipped to do rapid diligence from LOI to close, Mauricio says, simply because "they're largely doing a financial transaction as opposed to trying to get consent from all their other divisions and customers, etc. This also implies that the success factors will benefit the larger funds that have very established processes for diligence…You often have multiple buyers and multiple PE firms. It's the ones who can go through the process more efficiently and they project themselves as being the more confident acquirers to the seller…they'll oftentimes get more attention and more responsiveness in a way that the other firms won't."

D. Is deal compression really a new phenomenon?

"If you go back to the era of 1990 through 2000 or 2001, I would say they make the pace of today's pace seem slow. There was an insane abbreviated pace for doing deals during the middle of that bubble period." – Robert Townsend, Partner, Morrison & Foerster

While 2014 was the biggest year for M&A in more than a decade, and deal time compression played a significant role in this, several longtime M&A advisors point out that there have been similar periods of compression in the past, most recently the "Dot-com Bubble" of the late 1990s, as well as during a similar period of big mergers in the 1980s. Indeed, time compression seems to correlate to the pace of activity in M&A in general.

Robert Townsend is co-chair of San Francisco-based law firm Morrison & Foerster's Global M&A Practice Group. He has more than 30 years of experience in the fields of M&A, securities law, technology and intellectual property matters, leveraged buyouts, and venture capital, representing represented clients in more than 200 public and private company acquisitions, including numerous multi-billion dollar transactions. Townsend says: "As somebody who has been doing this for a long period time, the time frame of deals does ebb and flow a little. If you go back to the era of 1990 through 2000 or 2001, I would say they make the pace of today's pace seem slow. There was an insane abbreviated pace for doing deals during the middle of that bubble period. We see some uptick in pace today because we are back to an environment in which buyers feel they have to move with alacrity in order to compete for attractive targets. I would say less attractive companies, public

"Get in early and try to persuade the sellers to use the buyer's standard." ~ Robert Townsend

or private, are proceeding at the same pace as always, but if you have a very attractive company, public or private, for sale, the sellers themselves will want to get it done quickly subject to whatever process maximizes the sales price, and the buyers will want to move quickly to preclude someone else from stepping in."

Townsend also sees the virtual data rooms enabling acceleration of the process, aiding both buyers and sellers in organizing the information that will be reviewed during due diligence. Particularly in directly negotiated deals, he counsels buyers to "get in early and try to persuade the sellers to use the buyer's standard form organization list for due diligence for information that would coincide with the due diligence request, because it's much easier for buyers to assimilate data and to get it into the hands of the right people internally to review if it is organized along the lines of how the buyer structured its own diligence process." He adds there is no industry standard form, but buyers will typically have their own internal form for a particular deal ahead of the seller, and the forms will differ from private to publicly held companies. Townsend adds that because of Securities and Exchange Commission fling requirements, "There is already a great deal of information in the public domain when you're dealing with publicly held target companies." Private companies are a different story, he says: "You're starting from scratch...and so the request list is going to be much longer."

E. How many cooks in the kitchen?

"Say one company is 60 percent of the deal, and one's 40 percent. But the people who are 40 percent don't think they're 40 percent – they think maybe we're better."
– Van Conway, CEO, Conway MacKenzie

From the seller's standpoint, Townsend says, "there is always a tension internally as to the number of what are called 'knowers' or people within the organization who are brought into the group of people who know this deal is happening. What people try very hard to do with an M&A deal is keep it as confidential as possible. If you have an accelerated process, from the sell side it means you may have to bring in more knowers earlier in the process before

you reach a level of certainty that this transaction is going to happen than you might otherwise be comfortable with. It's very hard to make the necessary disclosures without having the people you know are responsible those areas participating in the process and providing that information." He notes that all of these "knowers" also have "day jobs," and may see the additional demands on their time put on by compressed due diligence process as an inconvenience.

Benjamin Perkins is a Senior Managing Director and the U.S. Life Sciences Sector Leader for Ernst & Young Capital Advisors, LLC, with 17 years of investment banking and corporate finance experience and $7 billion worth of closed deals. Because of deal time compression, Perkins says, his team now generally takes 1-2 days internally prior to submitting the LOI "to understand exactly what are we going to focus on as part of the diligence process. What are the 5-10 key issues that we need to get a better understanding of to get a better value? Are we going to do it aggressively or are we going to slow burn? Historically what we would do as an M&A advisor would be to pick over the data that we believed to be of value and then come back and have a boardroom discussion of – okay, here are the things that we found, here are the things that we're concerned about. In today's environment, you really need to go into that LOI period with 'here are the top 10 things I need to understand.' It may be a financial question, it may be a reimbursement question, it may be a question of geographic footprint, but there are a number of issues that you as management, you as an advisor, that you want to feel darned sure about before you sign anything in a Purchase Agreement."

Van Conway is a founder and CEO of Conway MacKenzie, a middle-market M&A advisor firm with more than 40 years in the business. Over the years he's seen "bad deals that shouldn't have been done" and maintains that "due diligence that is rushed puts all the risk on the buyer. We're not in that stage yet but we're moving in that direction." Among all the value considerations examined during the due diligence process, he notes that personalities can often influence the outcome more than data. "You get into deals where, say, two CEOs are going to merge. Who's going to be the new CEO? Well, trust me, the guy not getting the job might tank it. It happens in corporate America. We call it a 'dating issue.' Why spend a money analyzing each other if one guy doesn't get it, he'll tank the deal."

"The Purchase Agreement is the deal." ~ Steven Goldberg

Likewise, Conway observes, the more people involved in the deal, the greater the risk of internal opposition. "Say one company is 60 percent of the deal, and one's 40 percent. But the people who are 40 percent don't think they're 40 percent – they think maybe we're better. Then they find out 'we gotta move,' 'my boss is getting swept out.' The personal side of the personnel issues, including the headquarters, can blow deals up. So we say, you're got to have these issues negotiated before you spend hundreds of thousands of dollars in Due Diligence and then find out at the altar, we never were going to get it done."

PART II: The Purchase Agreement – the formal, enforceable legal document

A. The emergence of Rep and Warranty Insurance alongside the Purchase Agreement

"Basically the way it works is pretty similar to your car insurance – you've got an overall cap, you've got a deductible and you've got a premium."
– James Dougherty, Partner, Jones Day

Colorful as always, Conway likens the signing of the Purchase Agreement to "finding out if your wife likes you before you marry her. It's like a pre-nup agreement. If something goes wrong, you go to the agreement. Paragraph 64. Yes, that's what it says." The Purchase Agreement, all agree, is the document you have to live by in a merger or acquisition. "The quality of the Due Diligence will result in the quality of the Purchase Agreement," Conway says.

"The Purchase Agreement is the deal; its significance cannot be understated," says Steven Goldberg of BakerHostetler. "The Purchase Agreement is the final and only memorialization of the entire business agreement between a buyer and a seller. It is the document that will govern how the business is run between signing and closing and then what recourse can be had by the purchaser post close if aspects of the business were misrepresented or unforeseen litigation occurs. Most Delaware courts are now realizing that words have meaning and are more loathe to go outside the four corners of the

agreement if interpretation inside the agreement is possible." Also important: Purchase Agreements can be significant as a precedent for subsequent transactions. "Parties will often stick to, or conversely be held to, certain positions taken in a previous Purchase Agreement," Goldberg said.

While important, James Dougherty of the Jones Day law firm in Cleveland, says the Purchase Agreement's "role has diminished substantially" during the current cycle of M&A. One reason – "you have a very limited amount of recourse as a buyer in most deals these days. You're going to get a relatively skinny set of reps and warranties, and your remedy for breach of rep is going to be the indemnity, which is going to be fairly low." In a lot of deals middle market deals today, Dougherty says, the indemnity caps range from 3 to 10 percent of the purchase price.

The other reason why the Purchase Agreement has become less important, he says, is "the emergence of Rep and Warranty insurance." A relatively new phenomenon in M&A, rep and warranty insurance. Rep and Warranty policies insure buyers and sellers against the risk of inaccuracy, falsity or a breach of the representations and warranties contained in a Purchase Agreement. "Basically the way it works is pretty similar to your car insurance – you've got

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Rep and Warranty Insurance From The Broker Perspective

Jay Morascak is Senior Vice President at Aon Risk Solutions in Cleveland, and previously was with the M&A group at Wells Fargo Insurance Services. He has worked with James Dougherty of the Jones Day law firm on a number of transactions that have been insured by a Rep and Warranty policy. "Rep and Warranty insurance has been around for a while but it's really been gaining a lot of traction in the last 18-24 months. Even 36 months ago, people were just starting to look at it. The marketplace was becoming more receptive to it so the underwriters were getting more sophisticated in doing it because deals were sometimes not happening or were running into significant hurdles. So the insurance industry looked at that as an opportunity to try to put a product in place that will potentially help both buyer and seller to reduce the uncertainty and also help with a cheaper way of getting the deal done."

Of course, just as in writing a Purchase Agreement, writing a Rep and Warranty policy involves diligence and the devil is in the details. "Every situation is a

"Writing a Rep and Warranty policy involves diligence."
~ Jay M. Morascak

unique set of challenges, so what we've seen is a growing sophistication within the insurance marketplace, and also with buyers and sellers, of using Rep and Warranty products as a way to help facilitate deals," Morascak said. "And underwriters have become much more sophisticated in terms of the M&A world. We have former M&A tax people, former M&A lawyers who are now in the underwriting side of it."

As underwriters have become more sophisticated as assessing M&A risk, insurers have become more willing to write policies. But because each M&A deal is so unique, insurers and underwriters are limited in using "boilerplate" language in their Rep and Warranty policies, Morascak says. "We would consider this an untraditional insurance product and each transaction is underwritten specifically given the situation and crafted to the deal."

Rep and Warranty policies have had more use in larger deals, Morascak says, but are becoming more common in deals under $100 million. "Not every deal uses Rep and Warranty insurance but I would say it's becoming more looked at – it's a standard checklist item in most deals today."

an overall cap, you've got a deductible and you've got a premium," Dougherty says. "So the private equity seller really started this. They basically said: 'we're not going to wind up giving you indemnities. When we sell a business we want to distribute cash to our partners and we'll give you a low cap for maybe one year.' And buyers were in a conundrum because they wanted these businesses but they weren't comfortable with the low (indemnity) cap. Rep and Warranty insurance has emerged as a way to fill that gap."

B. Purchase Agreement is drafted concurrent with the Due Diligence process

"There's always been a balancing act… particularly after the LOI of when you start documentation and when you complete diligence." – Dino Mauricio, COO, Head of M&A Advisory, Brock Capital

The due diligence process has always paralleled the drafting of the Purchase Agreement, and it has always been a balancing act, says Dino Mauricio of

Brock Capital. "In the past you'd want to complete as much of the diligence as you could before you start with the documentation. Why? Because as you go forward in the diligence the chances of actually completing the deal go up. But then once you start documentation it really takes away time and resources away from what otherwise could be used for diligence. So there's always been a balancing act… particularly after the LOI of when you start documentation and when you complete diligence. What's happened with the compressed time frames, you automatically do both. Because once you get to the LOI, you've got an exclusivity period and you're much more confident that you can get a deal done."

Issues can arise during the parallel track of due diligence and drafting the Purchase Agreement. Unexpected discoveries or surprises that are brought to light during due diligence can be very distracting and result in major changes in the documentation. "Sometimes you have to bring in different types of lawyers, or there's an outside party that has to advice on that. It adds another layer of negotiations," Mauricio says, adding that cultural issues and cross-border issues can also complicate the parallel processes, he says: "Technology companies being acquired by brick-and-mortar companies – you have these cultural factors that can enter into the negotiation process that are still being ironed out during the due diligence." Additionally, buyers often introduce financing considerations during the twin-tracked due diligence/Purchase Agreement processes. "Buyers have do so some contracting with financiers and that just increases the amount of that's being done in the final stages of this period before close." Mauricio said.

Steven Goldberg of BakerHostetler offers some practical advice for dealing with these kinds of inevitable issues: "We believe that the best way to deal with these type of conflicts is not to take them personally, and to maintain a cooperative, forward-thinking approach to getting the transaction done as efficiently as possible in a manner that most closely resembles the originally agreed deal. This often requires frank, no-nonsense discussions between the parties representatives (often the lawyers) so that some of the emotion may be taken out of the equation and the parties can focus on the end goal."

C. Overcoming the obstacles to doing a deal

"When the process is not organized is often when mistakes or unnecessary misunderstandings occur." – Steven Goldberg, Partner, BakerHostetler

"Diligence is a fairly adversarial period. In almost every transaction my team gets frustrated with the buyer and questions whether they'll be a good partner

"A deal is three things: How much money you get, when you get it, and why you might have to give it back." ~ Ronald Miller

for the management going forward," says Ron Miller of investment bank Cleary Gull. "The advice I give buyers in every transaction is – 10 days into the deal, just go have a beer with the management team. Don't have your daggers out. Don't discuss questions and challenges in diligence, just build a relationship, because these are the people you're going to be backing to drive your value creation going forward."

"A deal is three things. How much money you get, when you get it, and why you might have to give it back," Miller says.

Ben Perkins of Ernst & Young says most of his time during the lead up to Purchase Agreement period is spent on indemnification issues. Because of the compressed time frame, parties don't feel like they've had the time to address some issues the way they would have liked with more time. "We're also spending a lot of time negotiating earn-out payments and milestone payments and things like that where, if there is a discrepancy about what the value of the acquisition may be, you try to capture that through ongoing payments if certain milestones are met," Perkins states.

Organization among the parties and working through the process together is often the most important method for refining the purchase agreement, says Steven Goldberg of BakerHostetler. "Knowing when, and in what form, to expect comments or revisions from the opposing party is critical so that ample time is provided for to give the purchase agreement a "clean read" and to receive the required business thoughts and specialists (i.e., tax, environmental, employment) input. When the process is not organized is often when mistakes or unnecessary misunderstandings occur."

Robert Townsend of law firm Morrison & Foerster says one of the critical time elements and most important aspects of diligence is reviewing the financial statements of the target company. They are released periodically and are historical-looking, but also contain projections for future periods. "So both of those are critical sources of information on the performance of the business that you're buying. The projections are usually delivered very early on and don't change much during the deal." He notes that deal teams have to be careful not

to announce or sign a deal just before new earnings are being released or financial information is being updated: "You as the buyer are going to want to have those financial statements in hand before you sign the bottom line." If new financial statements during the process reveal fundamental changes in the performance of the business, Townsend says that discovery "can have ramifications for whether the deal goes forward and, if so, at what price."

Another important issue is disclosure of sensitive agreements, Townsend adds, particularly because many deals involve competing companies. Prices and other terms in those agreements are sensitive and cannot be shared for obviously competitive reasons as well as anti-trust concerns, he says: "You need to stage the timing and the manner of disclosure of those so that as the seller you are not tipping your hand too much to the buyer and so that you manage legal risk around anti-trust and other things." Likewise, licensing agreements for products or intellectual property must be carefully scrutinized in diligence and have often become dealbreakers if issues are not resolved, particularly in the high-tech sector.

D. Getting to the signing of the Purchase Agreement

"In general once you get to the LOI you should have at least a 50 percent chance of closing… If you have a good LOI, you have a 75-80 percent chance of closing."– Dino Mauricio, COO and Head of M&A Advisory, Brock Capital

The signing of the Purchase Agreement usually signals the passing of the deal baton from the investment banker who negotiated the deal to a lawyer who finalizes the details. Either party can draft the Purchase Agreement, but in most cases the buyer drafts the document, often long before the LOI.

"Ideally if you're a buyer, in a perfect world you would do all of your diligence first and then you would turn to doing the contract because you're doing the contract with the most information possible. But that rarely happens," says attorney M&A attorney Robert Townsend. "So from a buyer's standpoint, assuming you are moving in parallel, one of the most important things is to insure that the definitive agreement does not get too far in front of the stage of due diligence so that you still have the ability to go back and modify the contract to reflect things that have come up in diligence, and that the seller cannot accurately say you have passed on doing so because you have already resolved those points. From the seller's standpoint, there is always the balancing act of insuring that you have disclosed at an early stage the material

"Once you get to the LOI you should have at least 50 percent chance of closing." ~ Dino Mauricio

information that could impact the principal terms of the transaction to minimize the risk that you are re-traded later by the buyer," states Townsend, further adding:

"Sellers typically have less and less leverage as the deal goes on."

Dino Mauricio of investment bank Brock Capital points out: "In general once you get to the LOI you should have at least 50 percent chance of closing. In general, issues that can break deal are material discoveries or unexpected issues. If you have a good LOI, you have 75-80 percent chance of closing." He says after the LOI stage it's important to have a "firm timetable to close" and that the people involved in the process are the decision makers. "You don't want to have people there that have to go check back with other people – it just complicates things. And make sure you line up all the relevant advisors and industry experts that are needed."

Leading up to the signing of the Purchase Agreement, the intermediaries should be playing big roles, Mauricio says: "One of the reasons you hire lawyers and bankers and consultants is they have prior transaction experience, familiarity with issues in that industry or with this deal, so they can quickly get to the right terminology in the Purchase Agreement. If it's just a buyer and seller trying to hash out terms, it really takes away from the process. The lawyers and transaction advisors really insure that what is required gets captured in the purchase document. Again, the decision makers have to be involved so that as you're working through the issues and there's accountability for deciding what's involved in the documentation."

Particular value that an investment banker may add, Ronald Miller says, is dealmaking history: "I've shown 35 transactions to {one PE firm}. We keep a database. We actually know their contract terms on what the buyers are willing to do. We know their negotiating styles. We track buyer behavior. We share. Again this industry has gotten a lot more sophisticated – when we are presenting buyers and proposals to our sellers, we talk to our sellers about the buyers prior behavior, whether they close on their Letter of Intent, how much

money they have, how they have negotiated in prior transactions. We capture their behavior and that's incredibly important to the ultimate choice of who their partner should be. We reference check almost every transaction. I'm in the Midwest. We actually care who we sell to."

"There also has to be a commitment to 'deal point resolve,'" Mauricio adds. "So any deal point that has been resolved has to be untouchable. You can't have a situation where you're resolving a third thing and the buyer goes back and tries to rehash a prior point. That's a ground rule that's been place for awhile – otherwise everything gets to be interdependent and you never come to an agreement."

Finally, "you have to know when the negotiations aren't being productive," Mauricio says. "Even some of the best strategic acquirers will get involved in negotiations where because of their prior success they feel like they can make the deal happen by brute force, or by throwing enough lawyers in there or pounding the table. But at some point, if the Purchase Agreement can't come to a common understanding, it's best to just break those negotiations off because you'll just waste time and resources that could otherwise be spent on another deal."

PART III. The Close: the Beginning of the End

A. The advantages of simultaneous closings

"It mitigates one of the major risks in M&A which is the deterioration of the business once an agreement has been signed to sell the business."
– Robert Townsend, Partner, Morrison & Foerster

In today's M&A marketplace, parties sign the transaction documents and close on the deal simultaneously whenever possible, the best dealmakers say, although deferred closings are sometimes inevitable, particularly where shareholder approval, regulatory consent or other matters are involved. A simultaneous signing and closing benefits both parties because it eliminates transaction risks – such as a natural disaster or loss of key customers – during the intervening period. A simultaneous closing can save time and eliminate the need for lengthy negotiations over who should bear the risk of such events.

"Simultaneous signings and closings are advantageous for both parties because they are often less complex, less time-consuming and less costly," noted BakerHostetler's Steven Goldberg. "They also provide certainty in the

"The sellers pay less attention to the business once a buyer's committed to buying it." ~ Robert Townsend

sense that a signed deal is, in fact, closed. That's not always doable because of regulatory requirements like obtaining Hart-Scott-Rodino {a federally-mandated pre-merger requirement} clearance or a permit upon a change of control."

Says Brock Capital's Dino Mauricio: "Simultaneous signing and closing is the default. You would love to have both parties sign and close at the same time and that eliminates transaction risks during that intervening period. It means you don't have to raise any uncertainties on what could happen between signing and closing such as something happening with the business or the customer or a supplier. It could be some environmental item or some disaster. So it really saves time and resources."

Morrison & Forerster's Rob Townsend says of a simultaneous closing: "It mitigates one of the major risks in M&A which is the deterioration of the business once an agreement has been signed to sell the business. It's just human nature to have people who are running the business – the sellers – pay less attention to the business once a buyer's committed to buying it and before a subsequent closing can happen. That is not good for the buyer or

DEAL NOTES

M&A Advice From The Corporate Perspective: Downing Wellhead

In 2014, the M&A Advisor's Energy Deal of the Year (up to $100 million) was the acquisition of Downing Wellhead Equipment by Argonaut Private Equity.

Gene Downing, who founded his company in 1980, ran a complete wellhead company providing manufacturing, remanufacturing and field service to the oil and gas industry. He had expanded the business over the years and many of his original employees were still with him 35 years later.

"The reason I sold it: I'm an old fart," Downing said. "I used to think that I'm never gonna die that I would just keep on doing what I'm doing. And then I was driving down the road and Hank Williams, Sr., came on [the radio]....his song, 'I'll Never Get Out of this World Alive.' "

Downing started looking around 3-4 years prior to selling his 80 percent of his company in April 2014 to Argonaut Private Equity. He brought in a group who he said did a terrible job – "they were dumber than a box of rocks"– valuing his company. Meanwhile, word got out of his interest in selling and he was inundated with interest. "They were sending flowers and I was getting phone calls; everybody was coming out of the woodwork."

Something about a flyer that came in the mail from Allegiance Capital, a Dallas-based investment banking firm, caught Downing's attention.

"There was something about {the investment bank} that seemed to me that these folks were different. Maybe it was a God thing," he said. "So my wife and I jumped in a plane, went down to Dallas, went to their office and talked to them, looked at them. And I was impressed with their demeanor. I was impressed with their sincerity. And then I walked up and down their hallways and saw all the tombstones {ads} on the deals they'd done and I recognized some of them and, man, I was impressed. They did some serious work here.

"Then when they started doing the work, I was extremely busy – working 50-60 hours to keep things going because we were in the middle of a big boom – and they really added so much value. When I first started it was like drinking from the fire hydrant – so much information. They walked me through everything. I've never seen anything that professional. They were on the same wavelength as we were. They understood the business. And that's what really makes the difference."

The process took about 6 months – the number of companies interested exceeded 50 and were winnowed down to about a dozen before Argonaut made an aggressive move to make the deal. "We had previous dealings with them – they were known to us and it was a good working relationship," Downing says of Argonaut. "Both parties knew what the others were looking for.

"My original employees were very, very important. I've got some of my original employees who have been here 35 years. I spent a couple of years thinking about this – looking at it and analyzing it to insure that the person I sold it to would have the same values I did."

Allegiance Capital managed the complete marketing and sales process for Downing Wellhead. This included: preliminary valuation, marketing the company both domestically and internationally, soliciting IOI's, negotiating the LOI, managing due diligence with buyer, structuring, financing, and executing the closing.

"It was a privilege to work with Gene and Jo Downing during the sale of their company," said John Sloan, Vice Chairman and Senior Managing Director

"The benefit of a delayed closing is you want to get your customer calls and final approvals after you know you have a deal." ~ Ronald Miller

of Allegiance Capital. "Their professional approach to the process and their dedication to working with us and with potential buyers to overcome any issues that developed, enabled us to successfully craft a transaction that worked well for both the buyer and seller."

the seller. It's not good for the buyer because the business that you're buying is not necessarily being well run while you're waiting to get to closing, and it's not good for the seller because their management team and their people are distracted and may be looking for other jobs and they may in fact find themselves not closing the deal at the end of the day – in which case they will be taking back a business that has been ignored for a period of time."

B. Why deferred closings?

"The buyer wants control of the business and the seller hasn't sold the company so they want freedom in running their business while they still own it."
– Ronald Miller, Managing Director and member of the firm's Board of Directors, Cleary Gull

Beyond regulatory hurdles, that can take months or years and are a fact of life in many industries, there are advantages to having deferred closings. BakerHostetler's Steven Goldberg points: "Simultaneous signings and closing are less common in asset transactions in which there are a large number of consents that need to be obtained, or complex share transactions where new entities need to be created and assets transferred amongst subsidiaries and any transaction in which regulatory approval is required. The obvious drawback of separate signings and closings is the lack of certainty that the deal will close. The format is often a 4-8 week lag time between signing and closing during which the parties can get the required regulatory approvals or do the necessary housekeeping to effectively transfer the assets at closing."

Investment banker Ron Miller says: "The benefit of a delayed closing is you want to get your customer calls and final approvals after you know you have

a deal. So it would be nice only to call customers after you have a signed agreement and the buyer can be conditioned to close the transaction to his satisfaction with customer interviews – they need a reason to change the price or back away from the transaction." But, he adds, sellers typically resist many conditions that buyers seek between signing the Purchase Agreement and closing the deal, which is usually a few days to a month. "The buyer wants control of the business and the seller hasn't sold the company so they want freedom in running their business while they still own it. So it is very difficult to agree on a mutual set of conditions between signing and closing." Miller said 80-90 percent of Cleary Gull's transactions are simultaneous sign-and-close deals.

A simultaneous closing may also increase shareholder risk since a target may have to go public about the transaction by soliciting shareholder consent and contractual consent from customers or vendors or other third parties minus a binding contract in place. In these situations, a deferred closing structure enables both parties to determine the rights and remedies of each party in the event the required consents are not obtained.

"Private equity firms are happy either way, but with a deferred closing they can have more leverage by discovering {more about the target}, but at the risk of not doing the deal," noted Dino Mauricio of Brock Capital.

C. Closings: Almost, not quite, at the finish line

"There should be a close proximity between the definitive agreement and the wire transfer. If something happens then, you've probably got a bigger problem than you think," – Van Conway, CEO, Conway MacKenzie

Typical closing deliveries include the following:

- The operative transaction document, such as the Purchase Agreement or the merger agreement, if not already executed.
- Board and stockholder consents authorizing the transaction.
- The corporate secretary's certificate certifying the accuracy and effectiveness of the relevant authorizing resolutions and charter documents of the target company.
- Legal opinions.
- Ancillary agreements and documents, such as promissory notes, bills of sale, employment agreements and escrow agreements.

“There should be a close proximity between the definitive agreement and the wire transfer.” ~ Van Conway

- Consideration (e.g., stock or cash).
- Financing agreements.
- Regulatory approvals.
- Evidence of third-party consents.
- Evidence of the release of any liens.

“The big category is post-closing obligations,” says Dino Mauricio of Brock Capital. “That includes all the representations and warranties, non-compete agreements, non-solicit or non-hiring requirements, certain indemnifications. Those should all be in place at the closing and survive after the closing.”

He adds that by the LOI stage, the parties should already have a list of deliverables needed at closing to avoid later misunderstandings. A consensus among the Best Dealmakers interviewed is that there are very few closing day glitches today due to the intense diligence process.

Robert Townsend of law firm Morrison & Foerster maintains that the important deliverable is the “purchase price – stock or cash.” Investment banker Van Conway says: “There should be a close proximity between the definitive agreement and the wire transfer. If something happens then, you’ve probably got a bigger problem than you think. It might be buyer’s remorse. Psychological things can happen. Or sellers can get anxious.”

Steven Goldberg of BakerHostetler points out: “Consents and regulatory approvals are often the areas where issues arise, as those items rely on third parties outside the immediate scope of the transaction. These hiccups can be remedied by proper planning ahead of time, but may also require both the buyer and seller working cooperatively to put pressure on the third party to accommodate the transaction timeline. An appropriate board record is also important to ensure that management is apprising the Board and for the Board to ultimately evidence to shareholders if necessary.”

Goldberg notes that a new development in 2014 has been an increase in activist involvement in M&A. “Activists are one engine driving the process for

splits and divestitures," he says. "The motivation behind activist activity is the belief that certain splits or divestitures will unlock value because the market will value the pieces individually higher than it would the company on an aggregate basis."

D. In-person versus virtual closings

"Anyone can do a deal, but to have success and some confidence in the marketplace, that requires some work." – Dino Mauricio, COO and Head of M&A Advisory, Brock Capital

Historically, closings occurred in person with representatives of both parties and their counsel present. It is now common practice, however, to complete closings by phone, fax, e-mail, and/or wire transfer without an in-person meeting. The advantages of a virtual closing are obvious in global deals, getting the signees around a virtual table much more easily than an in-person closing. Virtual closing didn't exist 20 years ago and were a novelty even a decade back. Now, virtually everyone interviewed for this edition of Best Practices of the Best Dealmakers says they are the predominant form of closing.

"There's hardly ever an in-person closing," said investment banker Ronald Miller of Cleveland. "I can't remember when I've been to one. It's very important that all stakeholders are available on the day of closing and 24 hours prior to closing. There tend to be a couple of key phone calls. I haven't had games played during closing – those usually happen more like a week of two before. There's more nail-biting then. My job in closing is to defend the price and the process."

Nonetheless, in-person closings still occur, and some transactions, including those involving the sale of real estate, require that certain documents be signed in person.

Dino Mauricio of Brock Capital is one who sees merit in the in-person process: "I've seen successful deals handled either way, and in my mind the deal is going to happen or not whether it's in-person or a virtual closing. It does not impact whether the deal gets done... Once you get to that point, it's really a convenience factor and also how the parties want to consummate their transaction. It shouldn't impact the success of the deal. That said, there are some advantages and disadvantages either way. One is the handshake and trust factor. There's certain things you can read into the other side when you do an in-person closing."

"Activists are one engine driving the process for splits and divestitures." ~ Steven Goldberg

Mauricio, as an investment banker, is also involved in after-closing issues and consulting with newly merged or acquired companies. "Anyone can do a deal, but to have success and some confidence in the marketplace, that requires some work. And I think an in-person closing starts that process to developing a dialogue with the seller that is not part of the negotiation. The negotiation is head-to-head, trying to extract the value, almost zero-sum, whereas once you have the closing you can start that dialogue. And you can have a virtual closing anytime, but if you set a date for an in-person closing of Friday, December 30th, for example, it imparts a bit more urgency and seriousness to the negotiations of the Purchase Agreement and the Diligence. That's really real."

Van Conway, the investment banker with more than 40 years in the business, lamented the demise of the in-person closing: "That's just kind of too bad. I'm an old-fashioned guy."

Conclusion

The devil is in the details of any M&A transaction. The due diligence process, running parallel to the drafting of the Purchase Agreement, is arguably the most important part of unlocking the value of the deal. The dealmakers in this edition, shared their best practice advice on getting through the process and arriving at a successful transaction – or, in some cases, recognizing when it is time to walk away from the deal. Technology has transformed the diligence process dramatically with the proliferation of virtual data rooms and virtual closings. Yet some lament the passing of the personal, confidence building touches measures that existed in the days of in-person signings and closings. And the closing is not THE END – which we explore in the next chapter.

CONTRIBUTORS' BIOGRAPHIES

Ronald D. Miller is Managing Director and member of the firm's Board of Directors at Cleary Gull. He shares responsibility for leading the investment banking department as well as actively managing transactions, business development, and private equity coverage. With over 24 years of transaction experience, Mr. Miller has advised clients completing approximately 100 merger and acquisition and public and private financing assignments representing approximately $8 billion of transaction value. Mr. Miller was a 2012 Finalist for the M&A Advisor "M&A Dealmaker of the Year".

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Gene Downing is Co-Founder and President of Downing Wellhead Equipment. Born and raised in Liberal, KS, Gene initially worked as a cement truck driver in oilfield operations. He gained experience in installing oilfield production equipment including wellheads and tanks. In 1965, he worked for Shaffer Tool Company in Liberal, KS, where he gained extensive wellhead equipment experience. In 1971, he was hired by Rector Well Equipment in Fort Worth, TX, and was subsequently transferred to their Oklahoma City, OK office. In 1980, after 10 years of establishing trusted O&G customer relationships with Rector, Gene founded his own wellhead equipment and service company, Downing Wellhead Equipment. Based in Oklahoma City, OK, Downing Wellhead Equipment initially specialized in wellhead remanufacturing, but began manufacturing its own proprietary wellhead equipment brand in 1983. Gene always stressed quality workmanship, excellent customer service and rational pricing which allowed Downing Wellhead Equipment to survive the O&G bust during the mid-1980s. Gene progressively expanded Downing Wellhead Equipment's operations to Midland, TX (1983), Houston, TX (1988), Corpus Christi, TX (1996), Tyler, TX (2007), Weatherford, TX (2008), and Williston, ND (2013). Gene went to Fort Hays State College. He has been married to Jo Downing for 49 years, and has 3 daughters and 9 grandchildren.

Steven H. Goldberg is a Partner at BakerHostetler, LLP. He is co-leader of the firm's national Mergers and Acquisitions team. He practices primarily in transactions, private equity, joint ventures, and strategic investments. For more than 20 years, he has represented both publicly traded and privately held companies on transactional matters in a number of industries. Steven frequently writes on corporate topics and has been cited in various professional periodicals. He has been continually recognized individually and for his practice in The Legal 500 and is ranked in the 2014 edition of Chambers USA: America's Leading Lawyers for Business. In 2014, The Legal 500 again named him a "Top 10 Leading Lawyer" in the <$500 million category. He was also named a "Super Lawyer" in the New York metropolitan region. He is the winner of the 2012 M&A Advisor TMT (Technology, Media and Telcom) Sector Deal of the Year Award and the 2010 M&A Advisor Middle Market Deal of the Year Award.

Dino Mauricio is COO and Head of M&A Advisory at Brock Capital, bringing over 25 years experience in mergers and acquisitions, corporate development, restructuring and private equity. Having advised and/or led 75 transactions with over $25 billion in combined market value, Dino helps clients achieve world-class M&A execution and postmerger integration. Prior to joining Brock Capital, Mr. Mauricio was Partner and practice leader in Strategy, M&A and Transformation at Schaffer Consulting. At Getzler Henrich, Dino was Managing Director and Head of Transaction Advisory Services, often serving in interim executive or Board advisory roles with clients facing complex mergers, divestitures and corporate turnarounds. As Managing Director of Business Development for GE Advanced Materials and GE Commercial Finance, Mr. Mauricio led several of GE's largest and best performing acquisitions, integrations and growth platforms. He has advised on cross-border transactions in 18 countries. Dino is a frequent conference speaker on M&A best practices and currently serves as a judge for the M&A Advisor Awards recognizing outstanding achievements in deal structuring and transaction execution. He has several published articles and citations in leading publications including Mergers & Acquisitions Journal, Corporate Dealmaker, TheDeal.com, American Banker, Buyouts, Financial Times, and The Journal of Applied Corporate Finance. He has co-authored a Harvard Business School case study in Strategy and Operations Improvement. Dino earned his M.B.A. degree at Harvard University and an A.B. in Economics from Dartmouth College.

Robert S. Townsend is a Partner at Morrison & Foerster. He is co-chair of Morrison & Foerster's Global M&A Practice Group. He has extensive transactional experience in the fields of M&A, securities law, technology and intellectual property matters, leveraged buyouts, and venture capital. He has represented clients in more than 200 public and private company acquisitions, strategic alliances, and financings, including numerous multi-billion dollar transactions. He represents companies operating in a broad range of industries, including technology (semiconductors, software, computers, Internet), telecommunications, media, consumer products, healthcare, life sciences, cleantech, energy, and wine. He has experience in all aspects of M&A, including hostile and friendly public company transactions, public and private tender offers, 13e-3 transactions, carve-outs, and divestitures, and private company acquisitions. Mr. Townsend often advises on complex cross-border transactions, particularly those involving Japan, where he practiced for a number of years.

Ben Perkins is a Partner & Senior Managing Director, Life Sciences Mergers & Acquisitions at Ernst & Young. He has 14 years of lead-, co- and exclusive advisory experience in the Pharma, Biotech, Device and Diagnostic sectors. He has worked with clients on equity and debt financings, merger and acquisition transactions and partnership structuring. Ben joined Ernst & Young from Merrill Lynch, where he served as a Managing Director leading the West Coast Life Sciences practice. Ben has over $5 billion in completed financing work and over $4 billion in completed M&A work in Life Sciences investment banking. Previously, he served as the Head of Healthcare Investment banking and as a member of the Executive committee for Pacific Growth Equities, a privately held investment bank. Ben holds a BS from Babson College.

Van Conway is CEO at Conway MacKenzie and nationally recognized in the fields of insolvency/ bankruptcy; financing, reorganization and management of troubled companies; mergers and acquisitions; debt restructuring; and litigation support. Mr. Conway has provided advisory services to under-performing businesses and related parties for nearly thirty years and is a Certified Turnaround Professional, Certified Insolvency and Restructuring Advisor and Certified in Distressed Business Valuation. He has been engaged as a turnaround consultant and financial advisor to clients in various industries, including: automotive, manufacturing, steel, service, transportation, distribution and contracting. As a financial advisor, he has worked closely with debtors, lenders and creditor committees in out-of-court or Chapter 11 restructurings and has provided consulting services in turnaround, profit enhancement and cost reduction strategies. Mr. Conway is a member of the Turnaround Management Association as well as numerous other professional organizations. He is a Certified Valuation Analyst and is Accredited in Business Valuation and Certified in Financial Forensics by the American Institute of Certified Public Accountants. He has a Bachelor of Science in Business Administration from John Carroll University and a Master of Business Administration from the University of Detroit. Additionally, he has served on several corporate Boards of Directors and frequently writes and speaks on the topics of managing troubled companies and litigation support.

Jay M. Moroscak, Esq., is a Senior Vice President with Aon Risk Services based in Cleveland, OH. Jay is responsible for leading client development in the mergers & acquisitions arena. He manages the strategy, client service and development for equity transactions involving private equity funds, strategic investors, venture capital, leveraged buyouts, restructurings, joint ventures & mezzanine financing. Jay has extensive experience in due diligence related to risk & insurance issues along with Health & Benefits, Human Capital Consulting and transactional risk solutions. Jay has over 15 years of experience in the risk management consulting industry and in designing insurance programs around his client's unique needs. He joined Aon Risk Solutions in 2014 and was previously with Wells Fargo Insurance and Marsh.

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